Public Prosecutor v Majiddi bin Abdul Majid

HIGH COURT (PULAU PINANG) — CRIMINAL TRIAL NO 45-11 OF 1998
KAMALANATHAN RATNAM J
18 OCTOBER 2002

Criminal Procedure *— Police investigations — Cautioned statements — Voluntariness — Whether the cautioned statement was made voluntarily*

Criminal Procedure *— Police investigations — Cautioned statements — Failure to explain to the accused the word 'dorongan' — Whether there had been any inducement before the accused made the statement*

The accused was charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 37,174g of cannabis and punishable with death under s 39B(2) of the Act. The arresting officer had testified that he headed a party of police who laid an ambush at Marvista Resort in Pulau Pinang. There he arrested the accused at the lobby and discovered what was suspected to be ganja below the driver's seat of a car. The accused was then taken to the police station and after interrogation, the accused led him and a party of ten police officers to a house where the police found 40 packets of compacted dried stuff which was believed to be ganja and a red plastic bag containing the same stuff. After these items were discovered, the accused had made a statement at the scene which he had recorded. Before the said statement could be tendered as having been made under s 37A of the Act, the defence objected on the ground that the statement was not made voluntarily and asked for a trial within a trial.

Held, acquitting and discharging the accused without calling upon him to enter his defence:

(1) The meaning conveyed by the use of the word 'menjanjikan' cannot reflect the true meaning of the word 'dorongan'. 'Menjanjikan' means to promise, whereas 'dorongan' means to induce. It would mean therefore that the arresting officer had failed to explain to the accused the meaning of the word 'dorongan'. Therefore, the accused could not have known if he was ever asked whether there had been any inducement before he made the statement (see p 81A–B).

(2) Since the arresting officer who recorded the cautioned statement himself admitted he was unable to answer if the statement made was voluntary and since he was at the scene and was privy to what went on, and if he himself was not sure, the court therefore could not be certain of the voluntariness of the statement. With all these doubts present in respect of the recording of the cautioned statement, the said cautioned statement could not be accepted as made voluntarily (see p 81C–F).

(3) On the failure of the prosecution to tender the fingerprints which they said they had lifted, the court acquitted and discharged the

A accused without calling upon him to enter his defence. Without the fingerprints there was no evidence of exclusive custody and control to assist in invoking the presumption under s 37(da) of the Act (see p 83A–B).

B **[Bahasa Malaysia summary**

Tertuduh telah dituduh dengan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dengan mengedar sebanyak 37,174g kanabis dan boleh dihukum mati di bawah s 39B(2) Akta tersebut. Pegawai yang menangkap tertuduh telah memberi C keterangan bahawa beliau telah mengetuai sekumpulan polis yang telah melaksanakan serang hendap di Marvista Resort di Pulau Pinang. Di sana beliau telah menangkap tertuduh di lobi dan telah menjumpai barang yang disyaki ganja di bawah tempat duduk pemandu. Tertuduh kemudiannya telah dibawa ke balai polis, dan setelah disoal siasat, tertuduh telah membawa pegawai dan D sekumpulan sepuluh orang anggota polis ke sebuah rumah di mana polis menjumpai 40 bungkusan barang kering yang dimampatkan yang disyaki ganja dan sebuah beg plastik merah yang mengandungi barang yang sama. Setelah barang-barang ini dijumpai, tertuduh telah membuat pernyataan di tempat kejadian yang telah dirakamkan oleh pegawai yang menangkap. Sebelum pernyataan tersebut boleh E dikemukakan sebagai yang telah dibuat di bawah s 37A Akta tersebut, pihak pembelaan telah membantah bahawa pernyataan tersebut tidak dibuat secara sukarela dan telah meminta perbicaraan di dalam perbicaraan diadakan.

F **Diputuskan**, membebaskan dan melepaskan tertuduh tanpa meminta beliau memasukkan pembelaannya:

(1) Tafsiran yang diberi oleh perkataan 'menjanjikan' tidak mencerminkan tafsiran sebenar perkataan 'dorongan'. 'Menjanjikan' bermaksud untuk berjanji, 'dorongan' pula bermaksud memberi dorongan. Ini bermakna bahawa pegawai G polis yang menangkap tertuduh telah gagal untuk menerangkan maksud perkataan 'dorongan'. Oleh itu, tertuduh tidak mungkin tahu sama ada beliau pernah ditanya sama ada terdapat sebarang dorongan sebelum beliau membuat pernyataan tersebut (lihat ms 81A–B).

H (2) Memandangkan pegawai yang menangkap tertuduh yang merakamkan pernyataan beramaran tersebut sendiri telah mengaku bahawa beliau tidak dapat menjawab sama ada pernyataan tersebut telah dibuat secara sukarela dan memandangkan beliau berada di tempat kejadian dan telah menyaksikan apa yang telah berlaku, dan beliau sendiri tidak I pasti, maka mahkamah tidak dapat memastikan pernyataan tersebut dibuat dengan sukarela. Dengan segala keraguan mengenai rakaman pernyataan beramaran tersebut, pernyataan

beramaran tersebut tidak boleh diterima sebagai dibuat secara sukarela (lihat ms 81C–F). A

(3) Kegagalan pihak pendakwaan untuk mengemukakan kesan jari, yang dikatakan telah diambil, mahkamah membebaskan dan melepaskan tertuduh tanpa meminta tertuduh memasukkan pembelaannya. Tanpa kesan jari, tiada terdapat keterangan mengenai jagaan eksklusif dan pengawalan untuk menolong dalam menggunakan anggapan di bawah s 37(da) Akta tersebut (lihat ms 83A–B). B

Notes C

For cases on cautioned statements, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 2374–2392.

Cases referred to

PP v Chong Wei Kian [1990] 3 MLJ 165 (refd) D
PP v Tan Keo Hock [1982] 2 MLJ 190 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37, (da), (g), 37A, 39B, (1)(a), (2) E
Evidence Act 1950 ss 27, 114(g)

CV Prabhakaran (*Kanakavalli* with him) (*Praba & Assoc*) for the accused.
Azman bin Abu Bakar (Attorney-General's Chambers) for the prosecution.

Kamalanathan Ratnam J: F

The charge

The accused was charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 37,174g of cannabis and punishable with death under s 39B(2) of the Act. The offence was alleged to have been committed on 15 September 1997 at about 3pm at G house No 4A, Jalan Sungei Nibong, Bayan Baru, Bayan Lepas in the District of Barat Daya in Pulau Pinang.

Inspector Chang Kut Choy ('SP8') testified that he headed a party of police who laid an ambush at Marvista Resort in Pulau Pinang on 15 July 1997 at about 12.30pm. There he arrested the accused at the lobby and H discovered what was suspected to be ganja below the driver's seat of a motor car in which both the accused and one Abdul Rahman had come. The accused was then taken to the police station and after interrogation the accused led him and a party of ten police officers to house No 4A, Jalan Sg Nibong, Bayan Baru, Bayan Lepas, Pulau Pinang.

On reaching the house, the accused opened the locked front gate. The I front of the house was locked with a grille which the accused also opened. He then used a key to open the wooden front door to the house. The keys

to the three locks were found in the possession of the accused when he was arrested. As soon as they entered the hall, the accused led the police party to the room where the drugs were discovered. When the accused's handcuffs were removed, he went towards a cupboard inside the room and opened it, and from inside the cupboard, the police found 31 packets of compacted dried stuff which SP8 believed was ganja. There was also a dressing table in the room. On opening it he found a further nine packets of similar stuff. Inside a drawer of the writing table in the room, he found a red plastic bag containing the same stuff. On the floor of the room he found many empty plastic packets. After these items were discovered, SP8 informed the court that the accused had made a statement at the scene which he had recorded. Before the said statement could be tendered as having been made under s 37A of the Act, the defence counsel objected on the ground that the statement was not been made voluntarily and asked for a trial within a trial.

The trial within a trial

Inspector Chang Kut Choy having resworn himself as SS1, the cautioned statement was marked as ID22. The said cautioned statement was recorded inside the room where the drugs were discovered, within ten minutes. SS1 testified that when making the statement, the accused was well, fit and co-operated with the police. He found no marks of injury on the body of the accused. When he was recording the same statement there were two other detectives, namely Det Cpl Rahman and L/Cpl Zubir, present in the room. The language used was Bahasa Melayu. Before he recorded the statement he read the statutory warning under s 37A of the Act to the accused. He had used a card in which he had recorded the statutory warning and he produced the same card and read out the statutory warning. After reading out the said warning, he explained the warning to the accused and the accused admitted to him that he understood the warning. After recording the statement, both he and the accused signed it. The recording was done in a question and answer form. He did not, before, during or after recording the statement, promise the accused any favours nor threaten nor force nor persuade nor induce him to give the statement. He testified that he was satisfied that the statement was made voluntarily. He also stated that at the time the accused made the statement he was not handcuffed and that he was in a proper state of mind. He experienced no difficulty in understanding the accused when recording the statement. After recording the statement, he read back to the accused who confirmed the truth of the contents. He then asked the accused if he wished to add or alter the statement and the accused did not wish to add or to alter the said statement. However, this has not been noted in the cautioned statement.

During the cross-examination, the defence counsel elicited an admission from SS1 that the accused was arrested together with one Abdul Rahman at the lobby of Marvista Resort. They were then taken from the lobby to the car parked outside in which both the accused and the said Abdul Rahman had come to Marvista. The next question and answer need to be reproduced verbatim:

Q: Betul ke tiada Abdul Rahman yang memegang satu bungkusan plastik yang mengandungi barang disyaki ganja?
A: Saya setuju.
Q: Dan di dalam kereta di bawah seat pemandu anda dapat barang disyaki ganja?
A: Benar.

SS1 testified that whilst laying in ambush, he saw the accused driving the said car with Abdul Rahman seated by his side. As soon as they alighted, they both entered the lobby where they were arrested. In fact, the accused ran and was arrested near the door to the lobby.

The second witness for the prosecution ('SS2') in respect of the trial within a trial was Chief Inspector Som Chai. He merely denied the defence's suggestion that when arresting the accused at Marvista, he had assaulted him.

On the next adjourned date of hearing, the junior counsel for the accused, Ms Kanakavalli recalled SS1 to the witness stand and put it to the witness that he had not in fact explained to the accused the meaning of the warning that the accused need not, nor was he obliged to, make a statement regarding the exhibits. In response, SS1 denied the allegation and contended that he did in fact explain this to the accused. When asked if he had recorded this, the witness became evasive and said he could not remember. When learned junior counsel referred him to the same cautioned statement, he admitted that he had indeed not recorded the fact that he had explained the meaning of the statutory warning to the accused.

The accused then took the witness stand in rebuttal. He testified that when he was arrested at the lobby of Marvista, he was assaulted by the police. This was denied by each of the five witnesses called by the prosecution. He identified three of the police officers who assaulted him when he was handcuffed. He confirmed that SS1 did not explain to him the statutory warning nor did he explain to him the meaning of the word 'dorongan'. When SS1 gave evidence he confirmed that he had ensured that there was no threat, promise or inducement offered to the accused to persuade him to make the cautioned statement. When asked if he had recorded in the cautioned statement that he had ensured this he said he had. But when shown the cautioned statement and asked to point out where he had recorded the word 'dorongan' he said, to him the word 'menjanjikan' which he had recorded, held the same meaning as 'dorongan'.

In his submission, defence counsel pointed out that there was no voluntariness in respect of the cautioned statement because of the following questions during cross-examination and the answers elicited from SS1:

Q: Saya katakan daripada semua soalan dalam ID22 cautioned statement percakapan itu bukanlah satu percakapan boleh dikatakan diberi sukarela?
A: Saya tak tahu jawab sebab percakapan telah dirakam oleh saya dan OKT juga turunkan tandatangan.
Q: Anda setuju apabila anda tanya satu soalan dan apabila dia jawabkan soalan, itu bukan sukarela?
A: Saya setuju sebab OKT jawab soalan saya.

I have checked the records and found that there was no re-examination on this issue. This is further supported by the evidence of the accused who said that he did not give the statement voluntarily and there was no challenge to this.

I also accept the defence's submission that the meaning conveyed by the use of the word 'menjanjikan' cannot reflect the true meaning of the word 'dorongan'. 'Menjanjikan' means to promise whereas 'dorongan' means to induce. It would mean therefore that SS1 had failed to explain to the accused the meaning of the word 'dorongan'. Therefore, the accused could not have known if he was ever asked whether there had been any inducement before he made the statement. So far as he had been explained by SS1, he was asked if there was any promise made since SS1 understood inducement to mean promise. To counter this submission, the learned deputy submitted that there was nothing in the law which requires the words in the statutory warning to be explained to the accused. What needs to be explained is the caution. The learned deputy urged the court to hold that induced means to promise.

I ruled during the trial within a trial that since SS1 who recorded the cautioned statement himself admitted he is unable to answer if the statement made was voluntarily, and since he was at the scene and was privy to what went on, and if he himself was not sure, this court therefore could not be certain of the voluntariness of the statement. I also held that I was not satisfied that SS1 had actually explained the meaning of 'dorongan' to the accused. I held that 'dorongan' and 'perjanjian' had different meanings. Since SS1 was of the view that 'perjanjian' and 'dorongan' meant the same, I held that SS1 could not be sure if he realized whether the meaning of 'perjanjian' actually contained any 'dorongan'. With all these doubts present in respect of the recording of the cautioned statement and in the light of the admission of SS1 that the statement was not voluntary because the answers were in response to his questions and therefore could not in that sense be termed voluntary, I ruled that the said cautioned statement could not be accepted as made voluntarily.

Findings of the court

When the case resumed, one of the main witnesses was Insp Pua Kok Shih, the investigating officer of this case. Under cross-examination, this witness admitted that he directed L/Cpl Mahizan to lift fingerprints from the exhibits recovered from the accused's room. Even when it was put to him that L/Cpl Mahizan did not lift the fingerprints from the said exhibits, Insp Pua vehemently denied that suggestion. With this witness, the prosecution closed its case after offering certain witnesses to the defence.

Trafficking

The defence argued that the prosecution had failed to prove trafficking. Once the cautioned statement was ruled inadmissible, there was virtually nothing to implicate the accused with the drugs. Under cross-examination SP8, Insp Chang, testified that the accused did not say anything else other than what he had said in the cautioned statement. Merely pointing out the

whereabouts of the drugs under s 27 of the Evidence Act 1950 does not establish possession. In *Public Prosecutor v Tan Keo Hock* [1982] 2 MLJ 190, the court held that since the actual words used by the accused were not proved, therefore whatever was stated by the accused that led to the discovery of the ammunition under s 27 of the Evidence Act was inadmissible. What is paramount is that recovery cannot be converted to discovery under s 27 under the circumstances where the actual words spoken were not proved.

As to the finding of the keys to the house in the pocket of the accused, I viewed this piece of evidence quite seriously notwithstanding the defence's reliance on *Public Prosecutor v Chong Wei Kian* [1990] 3 MLJ 165 where James Foong JC (as he then was) had held that the mere presence of the keys obtained in the accused's pockets was insufficient to activate the presumption of trafficking without further evidence of possession. In that case, his Lordship found that doubts were cast on the prosecution's case since there was no certainty that the accused had exclusive possession of the room in which the drugs were found. In the case before me, whilst the landlady of the house testified that when the accused first approached her with regard to renting the said premises, he was accompanied by a male Malay, she denied the defence's suggestion that it was that male Malay who rented the same premises. I also rejected the defence's contention that since the landlady admitted that she had a spare set of keys, there was therefore no exclusive control of the house by the accused. It is customary for every landlord/landlady to have a spare set of keys to the house rented for obvious reasons. In the absence of any evidence to the contrary, merely because the landlady in this case had a spare set of keys does not mean the accused did not have exclusive possession of the house. But the defence had throughout its case been suggesting that there was another person who was with the accused. The landlady had admitted seeing such a person. With this evidence I must now consider the bold statement of the investigating officer who under cross-examination by junior counsel Ms Kanakavalli, firmly confirmed that fingerprints were lifted from the exhibits found in the room that the accused opened with the keys.

The said inspector even identified the person who lifted the fingerprints as L/Cpl Mahizan. However L/Cpl Mahizan ('SP2') testified that the only instructions he received from the Investigating Officer, Insp Pua was to take 30 photographs of the scene and of the exhibits. He duly produced those photographs and negatives in court. What is most surprising is that for whatever it was worth, L/Cpl Mahizan was never recalled to clarify this issue of the missing fingerprints. The question of exclusive use of the room by the accused now becomes an issue. Did the accused have the exclusive use of the room? If so, why did the prosecution not tender the fingerprints which the investigating officer said were lifted. Could it be that if the said fingerprints were indeed tendered, they would not bear the fingerprints of the accused? Could it have been the fingerprints of Zubir who accompanied the accused when he rented the premises or Abdul Rahman who was arrested with the accused? I held that this was an appropriate situation to invoke s 114(g) of the Evidence Act against the prosecution.

A I was of the view that there was no need for me to even consider the fact that the chemist had failed to take the required 10% for testing pursuant to s 37(g) of the Act.

On the one issue of the failure of the prosecution to tender the fingerprints which they said they had lifted, I acquitted and discharged the B accused without calling upon him to enter his defence. Without the fingerprints there was no evidence of exclusive custody and control to assist in invoking the presumption under s 37(da) of the Act.

Accused acquitted and discharged without calling upon him to enter his defence.

C Reported by Peter Ling

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